No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD B. CALDERON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
H. BRIAN HOLLAND,
Assistant Attorney General,
MARVIN E. FRANKEL,
ELLIS N. SLACK,
JOSEPH M. HOWARD,
FRED O. FOLSOM,
DICKINSON THATCHER,
Special Assistants to the Attorney General,
Department of Justice, Washington 25, D. C.

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I

The Respondent's Characterization of this as a "Bare Net Worth Case" Is Erroneous. Since Respondent Voluntarily Admitted That He Had Unreported Taxable Income in Large Amounts, the Crucial Inquiry Concerns the Corroboration of His Admissions

1. Respondent's brief repeatedly describes this as a "bare net worth case," and states that "the only evidence of additional income offered by the Government was the alleged increase in net worth." (Br. 10, 16, 37, 63.) Building upon these clearly

erroneous statements of fact, respondent devotes considerable space (*e.g.*, pp. 23-35) to discussions in the abstract of "bare" net worth proof and of the asserted "assumption" by the Government (an assumption the Government wholly disclaims) that mere increases in net worth (visible or invisible) are sufficient to establish an attempt to evade taxes. The discussion, while its details would warrant dispute at various points even on its own level of abstraction, is beside the point. It is necessary to reemphasize the central fact in this case (necessarily acknowledged at various points in respondent's brief—*e.g.*, pp. 6, 51) that *respondent admitted he had unreported income* (R. 108-109, 219). The Government sought certiorari to have determined whether respondent's admissions, the voluntariness of which is unquestioned, could be used as part of the proof of the offense of attempted tax evasion.

2. As we have read its opinion, the Court of Appeals was concerned wholly, or at least primarily, with respondent's admissions that he had $500 in cash on hand at the beginning of 1946, the starting point of the Government's net worth computations. Reconsidered in the light of respondent's arguments, that reading still seems essentially correct.[1] Respondent argues, however, (a) that

[1] Pointing out that there was no question as to any other item in the net worth computation the Government established, the court below stated at the outset that the item of "cash on hand" at the starting point was the crucial and disputed one, without which "the remainder of the statement

there were in fact no such admissions (Br. 16-19), and (b) that the corroboration requirement must be considered anyhow in the light of the broad admission of unreported income rather than the admission only as to cash on hand (Br. 51). The first of these assertions is refuted by the record. As to the second, the broader admission is undoubtedly in the case; the sufficient reason against our having sought review initially in terms of this admission was that the decision below turned on whether the narrower admission, showing cash on hand at the starting point, had to be corroborated by independent evidence of this specific item.

a As the court below obviously agreed (R. 218, 219), there was convincing evidence that respond-

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proves nothing." (R. 218.) Stating the claim of respondent (appellant below), the court said he "contends there is no admissible evidence to show his charged understatements, since all the testimony concerning the cash on hand consisted of his extrajudicial admissions to the tax officials and to his tax consultant." (R. 219.) And this fairly stated respondent's argument, since he carefully emphasized below (Appellant's Br. 6) that the Government's asserted failure to prove by evidence independent of his admissions the item of cash on hand at the starting point resulted in the "basic error" of the District Court, "which [gave] rise or [established] a foundation for the remaining errors." It was this contention, we think, that the court sustained. Accordingly, our argument in the main brief was directed to (1) the court's major premise that, without the item of cash on hand, the undisputed evidence establishing the rest of the net worth computations "proves nothing", and (2) the evident conclusion from this that cash on hand had to be established by independent evidence of this specific fact before the corroboration required for respondent's admissions could be said to have been supplied.

ent had orally admitted having $500 in cash on hand at the end of 1945 (the starting point), and the record contains, in any event, the same admission in respondent's written statement signed under oath (see the Government's main brief, Appendix, p. 41). Special Agent Tucker testified that respondent had orally stated this fact to him (R. 59). On cross-examination, defense counsel elicited from Tucker that, in discussing the cash-on-hand item with respondent, and in his notes on the interview, Tucker had referred to "cash in his pocket" (R. 82, 85), and the argument here (Resp. Br. 17, 18) is that respondent's statement omitted cash in his safe. The testimony as a whole makes clear, however, that the agent's inquiries were directed to respondent's undeposited cash on hand (physically in a pocket or elsewhere), that this matter was discussed at length with respondent (R. 85), and that it was incorporated in the written net worth statement which was signed by respondent after the agents had reviewed each item with him for most of an entire day (R. 87, 123-124, 188, 191).[2]

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[2] In addition, in his written statement admitting unreported income, respondent said that it was his practice through the years in question to make regular deposits in his checking account sufficient to pay current expenses, and that he accumulated excess receipts only for short periods before depositing them in his savings account (R. 108). This was a further admission that it was not his practice to accumulate a large amount of cash on hand.

Respondent's vigorous insistence that it was improbable he had "*exactly*" $500 in cash on hand at the starting point (Br. 18) and that "not one cent of funds on hand December 31, 1945" was used to buy new machines the following year

From this evidence it is clear why the court below had no doubt respondent had made the admission around which the case has so far revolved. It is equally clear that the jury, resolving any supposed problems of credibility or uncertainty in the testimony, was entitled to find there had been such an admission. Cf. *Rutkin* v. *United States*, 343 U.S. 130, 135.

b. As to respondent's broader admission that he had failed to report taxable income (R. 108-109), we have accepted, for purposes of this case, the requirement that such an admission be supported by independent evidence. The question throughout has been whether, insofar as the independent proof took the form of a showing of net worth increases, it tended to establish the *corpus delicti*. And this question in turn has centered on whether the undisputed showing of large increases in respondent's other assets—business equipment, land, buildings, etc.—was meaningless apart from his admission that he had only $500 in cash on hand at the starting point.

Accordingly, our argument has been (1) that there was no need for independent evidence, apart

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(Br. 54), is wide of the mark. Of course, these figures are not intended to be accurate to the last cent. The problem as to starting point is simply to prove convincingly that no amount of assets has been overlooked sufficient to account for any substantial part of the net worth increases shown for the ensuing period. Moreover, the same kind of immaterial understatement could have occurred for dates subsequent to the starting point when respondent was similarly credited with "exactly" $500 in cash on hand.

from respondent's admissions, as to this specific item of cash on hand, and (2) that if such evidence was necessary, it was supplied in this case. Contrary to respondent (Br. 40-41), we urge as a factual proposition that marked increases in a person's visible, discoverable assets are evidence supporting an inference that the person is in receipt of current taxable income. Of course, the inference may not be so strong from such evidence alone as to be established beyond a reasonable doubt. But that is not the issue here. The issue is whether the evidence has any substantial probative force at all; because, if it has, there is corroboration for the admission (or admissions), and it is this problem of corroboration which is disputed.

The true issue, in other words, is not whether respondent's conviction could have been sustained without his admissions. Nobody has ever denied the importance of the admissions; it is not denied here. The question in simplest terms is only whether the independent evidence that respondent's wealth in various forms increased during the prosecution years sufficiently corroborated his admissions. Our point has been that there was, independent of the admissions, evidence of unreported income in the detailed net worth computations which, except for the item of cash on hand, was established beyond dispute. We have sought to show, moreover, that there was evidence of respondent's prior history to confirm his specific admission that his acquisitions during the years in issue did not come from a store of currency held

in his safe at the outset of this period.[3] And we contend that the independent evidence amply corroborated respondent's admissions.

Appearing to accept the majority rule of *Daeche*

[3] In this connection, respondent observes (Br. 56) that much of the evidence of his background and financial circumstances was supplied by his own testimony, and he appears to suggest that the sufficiency of the corroboration should be determined without reference to the testimony he gave in his own defense or on cross-examination (Br. 57). It is clear, however, that though respondent moved for acquittal at the close of the Government's case, the sufficiency of the evidence, including the sufficiency of the corroboration of his admissions, is to be judged here by all the evidence, including that developed in the course of the testimony produced for the defense. *United States* v. *Goldstein*, 168 F. 2d 666, 669-670 (C.A. 2); *Leyer* v. *United States*, 183 Fed. 102 (C.A. 2); *Hall* v. *United States*, 168 F. 2d 161, 164 (C.A. D.C.), certiorari den. 4, 334 U.S. 853; *Ladrey* v. *United States*, 155 F. 2d 417, 420 (C.A. D.C.); *Lii* v. *United States*, 198 F. 2d 109, 112 (C.A. 9).

Nor does it matter that the corroboration, both in the Government's evidence and in defendant's testimony, may have been supplied after evidence of respondent's admissions had been introduced (cf. Resp. Br. 56). "The order in which evidence to prove the corpus delicti is to be received is not important and is largely a matter within the discretion of the trial court. If proof in the nature of independent corroborative evidence supports the introduction of a confession, the time of its introduction is not important. It is sufficient if it is forthcoming at some point in the trial. All of the evidence in this case on which the Government relied was properly connected before the Government closed its case." *Adolfson* v. *United States*, 159 F. 2d 883, 888 (C.A. 9), certiorari denied, 331 U.S. 818. See also *Matz* v. *United States*, 158 F. 2d 190, 192 (C.A. D.C.); *Blumenthal* v. *United States*, 158 F. 2d 883, 889 (C.A. 9), affirmed, 332 U.S. 539. It is peculiarly appropriate in a case of alleged tax evasion, where the events as they actually unfold begin with returns and explanations by the taxpayer, that the facts narrated at the trial should include an early account of the defendant's declarations regarding the matters in issue.

v. *United States*, 250 Fed. 566 (C.A. 2), and urging it as the rule followed by the court below (Br. 48-51), respondent apparently agrees that independent evidence of the element of unreported income would constitute sufficient corroboration. What he denies is that there was any such proof at all.[4] On the issue thus joined, we rely on our main brief, having been primarily concerned in this reply with keeping this issue in focus.[5]

II

Respondent's General Discussion of the Difficulties of Net Worth Proof and Asserted Conditions Precedent for Its Use Is Irrelevant to this Case

As we have noted, much of the general theoretical discussion in respondent's brief overlooks the vital point in this case that he admitted unreported income. For the sake of clarity, we pinpoint three of the matters so discussed only to dispel the suggestion that they have any bearing here.

1. In the Government's brief in *Holland* v. *United States*, No. 37 (pp. 32-40), we have sought to demonstrate the fallacy of the contention that

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[4] Interesting in this connection is the contrast between (1) respondent's agreement, discussing *Daeche* (Br. 51), that evidence of communication with alleged co-conspirators and of efforts to obtain explosives "clearly established one element of the offense—attempting to destroy a vessel—" and (2) his insistence that proof of large acquisitions of business and other properties is no evidence whatsoever tending to show income.

[5] On the sufficiency of the proof of wilfulness, see Point III, *infra*.

the net worth method of proof may not be employed at all unless the defendant's books have been shown to be inaccurate or his "method of accounting" has been proved inadequate. That demonstration would apply here if respondent's presentation of the same fallacy (Br. 27-30) had any place in this case. But apart from the fact that he posed no such issue below (see Resp. Br. 29, fn. 8), respondent's discussion is rendered pointless by (1) his own admission of unreported income and (2) the established fact that his books and records were inadequate and incomplete (R. 89). This latter fact has not merely been undisputed; it has heretofore been a matter upon which respondent himself insisted, declaring, for example, in his brief before the court below (p. 3) that his "books and records were incomplete and so poorly kept that the consequent tax returns were also undoubtedly faulty * * *."

2. Similarly misconceived are the suggestions that proof of unreported income by the net worth method alone should be confined to "lucrative illicit enterprises which kept no books or records" (Resp. Br. 23-24), and that such circumstantial evidence can serve only to "reinforce" direct proof of unreported income (*id.*, 44-45). We do not stop to quarrel with such generalizations here except to note the futility of *a priori* abstractions for deciding concrete cases and to express our disagreement with the notion that the character of the defendant must inevitably determine the kind of evidence which may be probative of his guilt. It is

sufficient for present purposes that the evidence on which the jury convicted respondent meets his own theoretical test. He admitted unreported income; the proof of his net worth increases served precisely as reinforcement. It is, after all, in this most telling sense that we have urged that the necessary corroboration was supplied. The jury could certainly have found reliable the admission of unreported income when it was accompanied by proof that petitioner's tangible wealth increased at a rate wholly out of keeping with the tax-free returns he had filed.

3. Respondent points out (Br. 34-35) that in a "bare" net worth case the proof must show, not merely that the defendant got wealthier, but that the wealth stemmed from unreported income. There is no quarrel with this generalization. Then, however, as if this were pertinent here, respondent points out that increased wealth may come "from non-taxable sources, such as gifts, inheritances, insurance proceeds, soldier's bonus, etc." Here, again, it must be repeated that petitioner had admitted the source of his net worth increases to be unreported income, and had expressly denied receiving during the years in issue any gifts, inheritances, or insurance proceeds (R. 108). Moreover, at the trial, though repudiating the admission, he sought to establish none of the possible explanations his brief now lists. Testifying on his own behalf, he attempted as his exclusive explanation—exclusive of the conceivable answers other people might have to a charge of attempted tax evasion—to show that

his apparent net worth increases during the indictment years represented only purchases made from a store of cash held in his safe at the starting point.

III

There Was Sufficient Evidence of Wilfulness

Respondent's argument on this issue (Br. 61 *et seq.*) is that there was no evidence in the whole record, including his admissions, from which the jury could have been permitted to infer, as it did, that his attempt to evade taxes was wilful. He does not appear to insist that the independent evidence alone was required to prove this element of the offense. Cf. pp. 7-8, *supra*. It is clear, in any event, that even apart from the admissions, there was evidence of wilfulness, and that when the record is considered as a whole, including respondent's admissions, the proof on this issue amply warranted submission to the jury.

1. The visible net worth increases alone were some evidence of substantial amounts of unreported income for four successive years (R. 99, 102, 104). This proof, particularly when considered with the independent proof that respondent paid no taxes whatsoever during this four-year period, was at least some evidence on the issue of wilfulness. Cf. *Stinnett* v. *United States*, 173 F. 2d 129 (C.A. 4); *Paschen* v. *United States*, 70 F. 2d 491, 498-9 (C.A. 7); *Lisansky* v. *United States*, 31 F. 2d 846, 851 (C.A. 4), certiorari denied, 279 U. S. 873; *Gleckman* v. *United States*, 80 F. 2d 394, 401 (C.A. 8), certiorari denied, 297 U.S. 709.

In addition, the independent evidence showed that receipt books which were essential to the maintenance of books to reflect income correctly were missing, as respondent well knew. This situation was serious enough to cause respondent's bookkeeper, for his own information, to number the books. (R. 130-131.) Because the books of the business were made up on the basis of such original records (R. 127-128), respondent necessarily knew his receipts were understated. This, too, showed wilfulness. *Barrow* v. *United States*, 171 F. 2d 286, 287 (C.A. 5).

Similarly, respondent's awareness of the absurdly incorrect income reflected on his books and returns was proved by the testimony of his bookkeeper, Verdugo, that he advised respondent to get out of the vending machine business since the 1948 return indicated the business was actually losing money (R. 129-130). This advice was ignored. Plainly respondent knew the picture reflected on the return was wrong. *Barrow* v. *United States*, *supra*. His obvious unconcern, together with the facts of missing receipt books, missing invoices on coin machines (R. 89), and the many omissions from the books kept (R. 89), all reflect the conduct of the business in a manner the likely effect of which would be to conceal and mislead. *Spies* v. *United States*, 317 U. S. 492, 499.

Finally, the independent evidence showed that many of the coin-operated machines purchased by respondent were purchased for cash (R. 90-91).

The source of this cash in receipts could not be traced. In many cases invoices had not been entered (R. 88). The existence of a good many of the machines was not even shown on the books (R. 89). And since the machines were the means of producing income, their number and location would plainly have been necessary to an adequate set of books. The absence of such data was a further badge of concealment. *Spies* v. *United States*, *supra*.

2. When respondent's admissions that he had failed to report taxable income are read together with the foregoing independent evidence, the unsubstantiality of his argument that there was no proof of wilfulness is clear. His admissions show that receipts from thirteen locations in which his machines had been placed were consciously and deliberately understated (R. 109). As a result, while he knew of his tax obligation, he persistently filed returns which, despite the sizeable income he enjoyed, showed not a single cent owing to the Government. Plainly, the jury was entitled to conclude that respondent's conduct reflected a bad purpose and evil motive. *United States* v. *Murdock*, 290 U. S. 389, 394-395; *Spies* v. *United States*, *supra*; *Rutkin* v. *United States*, 343 U. S. 130, 135.

IV

Respondent Is Not Entitled to Seek a Judgment of Acquittal Here

At the end of his brief (p. 68), respondent suggests that the judgment of the Court of Appeals, which reversed his conviction and ordered a new trial (R. 229), should be modified, and that a judgment of acquittal should be ordered by this Court. Cf. *Bryan* v. *United States*, 338 U. S. 552. Respondent filed no cross-petition for certiorari. He may not now attack the portion of the judgment he considers adverse to him. *Morley Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191; *LeTulle* v. *Scofield*, 308 U. S. 415, 421-422.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

MARVIN E. FRANKEL,
ELLIS N. SLACK,
JOSEPH M. HOWARD,
FRED G. FOLSOM,
DICKINSON THATCHER,
Special Assistants to the Attorney General.

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